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**December 30, 2008**

**DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS**

*Hearing Officer's Decision*

Case Name: Personnel Security Hearing

Filing Date: August 15, 2008

Case Number: TSO-0662

This Decision considers the eligibility of XXXXXXXXXXXXXXXX (the individual) to hold an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As I explain below, the Department of Energy (DOE) should not grant the individual an access authorization.

**I. Background**

The individual applied for an access authorization. DOE Exh. 7 (Case Evaluation, May 2, 2008). The individual admitted during a Personnel Security Interview (PSI) that she did not file federal income tax returns for the years 2000 through 2006. DOE Exh. 3 (PSI, Dec. 6, 2007). During the PSI, the individual agreed to file those tax returns. *See* DOE Exh. 4 (Cert. to Provide Info., n.d.). She filed the tax returns on February 21, 2008. Hearing Exh. B (Individual's 2000-2006 Federal Income Tax Returns).

The local security office (LSO) issued the individual a Notification Letter, denying her an access authorization. DOE Exh. 1 (Notification Letter, June 26, 2008). The LSO alleged that the individual has "engaged in unusual conduct or . . . circumstances which tend to show that she is not honest, reliable, or trustworthy; or which furnishes reason to believe that she may be subject to pressure, coercion, exploitation or duress which may cause her to act contrary to the best interests of national security." *Id.* (quoting 10 C.F.R. § 710.8(l)) (hereinafter Criterion L). The LSO stated that the basis for its Criterion L security concern is that the individual did not file her federal income tax returns for the years 2000 through 2006. DOE Exh. 1 (Notification Letter, June 26, 2008). Since the individual filed her 2000 through 2006 tax returns before the LSO issued its Notification Letter, I read the allegation underlying the security concern to be that she did not file those tax returns on time.

The individual requested a hearing to respond to the LSO's security concern, which I conducted on October 21, 2008. The individual represented herself. She testified and called the following witnesses: her certified public accountant (CPA) and two friends. The DOE counsel did not call a witness.

## **II. Summary of Hearing Testimony**

### **A. The Individual**

The individual testified that she owned a small business. Tr. at 18. In 1999 and 2000, the business began to falter. *Id.* at 87-88. The business grew "slower and slower," and in 2003 she obtained other employment. In 2004 or 2005, she "let [the business] go." *Id.* at 18-20.

The individual believed that she had a legal obligation to file federal income tax returns for the years 2000 through 2006. *Id.* at 17. But instead of filing a tax return by April 15th of each year, "business competition" caused her to ask her CPA to file an extension. *Id.* at 17, 18-19, 35. Her CPA filed an extension in every year except 2002, when she thought that he filed an extension, but did not. *Id.* at 33-34.

"[D]own through the years" she followed-up with her CPA about filing her taxes. *Id.* at 39. In 2005, she paid her CPA \$250 to begin preparing her returns. She thought that in order for him to complete her returns, she needed to provide her complete tax information and his total fees. *Id.* at 86-87. At "the end of 2007," she "started really working on [gathering her information]" and brought her CPA her complete tax information. *Id.* at 39, 86. Her CPA "explained the cost" and gave her permission to pay his fees on a monthly plan. *Id.* at 32, 86. (She was not previously aware that her CPA would accept a payment plan. *Id.* at 85.) She replied, "Great. Let's get them done." *Id.* at 32.

In February 2008, the individual filed her tax returns for the years 2000 through 2006 (as well as the tax return for 2007). *See id.* at 32. The IRS did not refund \$7,000 or \$8,000 in withholdings for the years that she filed returns more than four years late. *Id.* at 26. She did receive a refund for \$6,000. *Id.* at 30.

The individual presented three reasons why she did not timely file her 2000 through 2006 tax returns. First, she did not have enough money to pay her CPA, who had charged her \$1,500 for each return before 1999, when her business thrived. *Id.* at 25-26, 32, 87. Meanwhile, her CPA advised her not to file any of the returns until she gathered enough information to file all the returns at once. *Id.* at 21, 40. Consequently, she believed that she needed several thousand dollars for the CPA to prepare her tax returns. *Id.* at 26, 87. She said, "I wanted to have them filed as soon as I could. It was just finances." *Id.* at 32.

Second, the individual did not think she had filing deadlines because her CPA had filed extensions and she "knew" that she did not owe taxes. *Id.* at 21, 38. She did not know if the IRS granted her extensions or set new filing deadlines. *Id.* at 21-22, 42-43. Nor did she confirm with her CPA her belief that she did not owe taxes. *Id.* at 38.

Third, a March 2003 storage fire destroyed three years of her financial records. *Id.* at 25, 29; Hearing Exh. D. In “a couple months” she was able to “reconstruct” those three years based upon information she had in her house. *Id.* at 29, 41.

B. The Individual’s Certified Public Accountant

The individual’s CPA testified that the law required her to file a tax return for the years 2000 through 2006. *Id.* at 49. The CPA filed her extension for each year except 2002. *Id.* at 52. (He left his accounting firm that year, and his departure agreement prevented him from serving the clients he had while at the firm. *Id.*) Each extension set a new filing deadline of October 15th. *Id.* at 51.

Each year the individual “expressed a desire to get [her tax returns] caught up” and she always intended to do so. *Id.* at 50, 61-62, 71-72, 77. In 2005, she paid the CPA a \$250 retainer to begin preparing her returns. *Id.* at 70, 73. He could not have estimated how much he would charge for each return because the individual had not given him enough information to complete them. *Id.* at 74. The individual understood that she needed to give the CPA more information for him to complete her returns. *Id.* at 68, 73.

The individual “later” brought the CPA the remaining information for him to complete her returns, although he cannot recall when. *Id.* at 74. The CPA then completed her returns, for which he charged \$165-175 per return, and she began paying his fees on a monthly basis. *Id.* at 74-76.

Regarding the individual’s delay in filing her tax returns, the CPA did not advise the individual to hold her returns to file them as a group. *Id.* at 71; *see also id.* at 54-55, 79. The CPA does not recall whether the individual told him that she could not pay his preparation fees all at once. *Id.* at 68. The individual’s 2003 fire “caused a lot of problems because [many] of their original [tax] documents were destroyed.” *Id.* at 56. Lastly, she is not a “tax protester” – she never made negative comments about the IRS – although she did not “do everything in her power to comply” with the law. *Id.* at 50, 61-62.

C. Friend #1

The first friend testified that she has known the individual since their early teens, and they are close friends. *Id.* at 46, 90. She has never doubted the individual’s integrity. *Id.* at 90. She has no knowledge of her failing to obey the law. *Id.* at 91. Lastly, the individual always lives within her means. *Id.* at 92.

D. Friend #2

The second friend testified that she has known the individual since 2002, when they met at church. *Id.* at 95. The individual helps her count the Sunday offerings. *Id.* at 97. She has never doubted her integrity and believes that she would never purposefully break the

law. *Id.* at 96, 98. Lastly, the individual is very organized and lives within her means. *Id.* at 99, 100.

### III. Legal Standard

In order to grant or restore an individual's access authorization, the Hearing Officer must find that the grant or restoration "will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. §§ 710.7(a), 710.27(a); *see also Dep't of the Navy v. Egan*, 484 U.S. 518, 528 (1988). In order for the Hearing Officer to make this finding, the individual must resolve the security concerns that the DOE identifies in its Notification Letter. *See, e.g., Personnel Security Hearing*, Case No. TSO-0586 (2008).<sup>1</sup>

The individual has the burden to resolve the DOE's security concerns because once the DOE finds a security concern, "[T]here is a strong presumption against granting a[n] access authorization." *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990). "[D]eterminations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see also* 10 C.F.R. § 710.7(a) ("Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security.").

The individual must carry or satisfy his or her burden to resolve the DOE's security concerns by presenting evidence to rebut, refute, explain, extenuate, or mitigate the allegations supporting the DOE's security concerns. *See, e.g., Personnel Security Hearing*, Case No. TSO-0598 (2008).

The Hearing Officer considers "all relevant information, favorable and unfavorable," to issue a decision that is "a comprehensive, common-sense judgment." 10 C.F.R. § 710.7(a). The Hearing Officer shall consider the witnesses' demeanor and credibility, and the authenticity and accuracy of documentary evidence. *Id.* at § 710.27(b). The Hearing Officer shall also consider the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledge and participation; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the voluntariness of participation; the absence or presence of rehabilitation or reformation and other pertinent behavior changes; the motivation of the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. *Id.* at §§ 710.7(c), 710.27(a).

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<sup>1</sup> Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

#### **IV. Analysis**

The individual presented three arguments to mitigate the allegation underlying the LSO's Criterion L security concern – she failed to timely file her federal income tax returns for the years 2000 through 2006. I address her three arguments in turn and conclude that the individual has not resolved the LSO's security concern.

First, the individual argued that she could not pay her CPA's fees because i) her CPA had charged her \$1,500 for each return before 1999, when her business thrived; ii) her CPA advised her not to file any returns until she gathered enough information to file all the returns at once; which led to iii) her belief that she needed several thousand dollars for the CPA to prepare her tax returns.

I find this argument unpersuasive because the fact that she did not ask her CPA what his fees would be – after her business faltered and she obtained other employment, presumably changing her tax situation – suggests that she did not responsibly handle her obligation to file her tax returns. Indeed, her CPA testified that he could not estimate his fees until she gave him the information to complete her returns, for which he charged much less than she assumed.

Further, her CPA could not recall advising the individual to hold her returns to file them all at once. Even if he had, she unreasonably delayed giving him her tax information. By 2005, her struggling business, which caused her to file extensions, finally closed. When she asked her CPA to complete her returns, he responded that he needed more information to do so. She supplied the information more than two years later – an unreasonable period, considering that each extension granted the individual another six months to file, and on several extensions she was already years overdue.

Second, the individual argued that she did not think that she had filing deadlines because her CPA had filed extensions and she “knew” that she did not owe taxes. I find this argument unpersuasive because the individual's belief that she did not have filing deadlines conflicts with her belief that she had a legal obligation to file. Moreover, she did not even know that the IRS granted her extensions, nor did she ask her CPA if the extensions set new filing deadlines.

Next, her belief that she did not owe taxes is unconvincing because she is not a tax professional and did not confirm her belief with her CPA. Indeed, during the years after her business failure and when she began working full-time, the individual had a regular income and may not have known if she did or did not owe taxes unless she had prepared returns. The fact that she was due significant refunds – which a reasonable person would have filed to receive – suggests that she did not know whether she owed taxes or if the IRS owed her a refund.

Third, the individual argued that her property fire caused her filing delay because it destroyed her tax records. Although I accept that the fire did cause delay, the fire was in

2003. The individual testified that she reconstructed her tax information in just a few months – far too little time to justify her delay in supplying information to her CPA.

I also find that the individual's handling of her 2002 tax return shows that she is not reliable. That is, the individual's testimony that she thought that her CPA filed an extension in 2002 – when he did not – suggests that she did not ask him if he did. And not knowing whether he filed the extension shows that she neglected her obligation to either file a return or an extension by the filing deadline.

Lastly, I find that while the individual's friends were credible witnesses, they did not provide information that was relevant to the significant issues – the individual's reasons for not filing her tax returns on time. Rather, I relied on the testimony of the individual and her CPA, because they have greater insight, knowledge, and experience regarding the individual's handling of her income tax returns.

## **V. Conclusion**

The individual has not resolved the LSO's Criterion L security concern. Therefore, I find that the DOE should not grant the individual an access authorization.

The parties may seek review of this Decision by an Appeal Panel, under the regulation set forth at 10 C.F.R. § 710.28.

David M. Petrush  
Hearing Officer  
Office of Hearings and Appeals

Date: December 30, 2008